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No. 10-294

Supreme Court, U.S.
FILED
NOV 29 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

IN RE: NED COMER; *et al.*,

Petitioners.

On Petition for a Writ of Mandamus to the United States Court of Appeals for the Fifth Circuit

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RULE 29.6 STATEMENT

Respondent The AES Corporation has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Respondent Allegheny Energy, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Respondent The American Petroleum Institute has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Respondent BP America Production Co. is wholly and indirectly owned by BP p.l.c., a publicly held British company. Respondent BP Products North America, Inc. is wholly and indirectly owned by BP p.l.c., a publicly held British company.

Respondent Chevron U.S.A. Inc. is wholly and indirectly owned by Chevron Corporation, a publicly held corporation.

Respondent Cinergy Corporation merged into Respondent Duke Energy Corporation, a publicly held corporation. There is no publicly traded company owning 10% or more of the stock of Duke Energy Corporation.

Respondent ConocoPhillips Company is a wholly owned subsidiary of ConocoPhillips, a publicly held corporation.

Respondent The Dow Chemical Company has no parent corporation and no publicly held corporation owns more than 10% of its stock.

Respondent E. I. du Pont de Nemours & Company has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Respondent Entergy Corporation has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Respondent Exxon Mobil Corporation has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Respondent Honeywell International Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock. Respondent Universal Oil Products is wholly and indirectly owned by Respondent Honeywell International Inc., a publicly held corporation.

Respondent Murphy Oil USA, Inc. is a wholly owned subsidiary of Murphy Oil Corporation, which is a publicly held corporation.

Respondent Reliant Energy Inc., now known as RRI Energy, Inc., has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Respondent Shell Oil Company is wholly and indirectly owned by Royal Dutch Shell plc, a publicly held Dutch company.

Respondent Xcel Energy Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

Having opposed every option by which the en banc Fifth Circuit could have proceeded to decide this appeal, Petitioners now claim that a writ of mandamus should issue to save them from the resulting dismissal for lack of a quorum. According to Petitioners, they have a "clear and indisputable" constitutional right to one outcome—a return to the three-judge panel that had previously ruled in their favor. But there is no such right, let alone a "clear and indisputable" one, and the Fifth Circuit's dismissal was the inevitable and proper result of Petitioners' steadfast resistance to every alternative *Respondents* suggested for allowing this appeal to be heard en banc. The exceptional remedy of mandamus is not warranted to undo the consequences of Petitioners' own tactical decisions. Indeed, the Petition does not satisfy any of the three essential prerequisites for extraordinary mandamus relief from this Court.

First, by resisting or bypassing every available option for obtaining a merits decision other than a return to the three-judge panel—including a merits certiorari petition in this Court—Petitioners have failed to pursue "'other adequate means to attain the relief" requested. *Cheney v. U.S. District Court*, 542 U.S. 367, 380 (2004).

Second, Petitioners have failed to show that their "right to issuance of the writ is clear and indisputable." *Id.* at 381 (internal quotation marks omitted). Petitioners' fundamental premise—that they have a "clear and indisputable" constitutional right to have the case returned to the three-judge panel—is plainly wrong. There is no constitutional right to an appeal in a civil case, and once Petitioners succeeded in persuading the en banc Fifth Circuit (over Respondents' objection) that the court lacked a quorum to act, the

court had no authority to do anything except dismiss the appeal. There was nothing improper or extraordinary about the Fifth Circuit's disposition, which mirrors what occurred when this Court lacked a quorum to decide an appeal as-of-right, *see Chrysler Corp. v. United States*, 314 U.S. 583, 583 (1941), and what occurs when an en banc court is evenly divided, *see Thompson v. Connick*, 578 F.3d 293, 293 (5th Cir. 2009) (en banc) (summarily affirming district court rather than returning the case to the three-judge panel). Moreover, given that the Fifth Circuit produced three separate opinions taking divergent views as to the proper disposition of this case, *see* Pet. App. 2-32, the only thing that is clear and indisputable is that the right answer below was *not* clear and indisputable.

Third, the totality of the circumstances makes this case an unsuitable candidate for an exercise of this Court's discretion to grant mandamus. *Cheney*, 542 U.S. at 381. Although Petitioners wrongly complain of an "egregious breakdown of regular procedure," Pet. 14, they fail to recognize that they shaped that procedure by actively opposing every option Respondents suggested for allowing the appeal to proceed before the en banc court. Moreover, even though the Fifth Circuit—and Petitioners themselves—emphasized below that merits review remained available in this Court, Petitioners elected not to file a certiorari petition on the merits. By instead filing a mandamus petition that carefully avoids almost *any* mention of the merits, Petitioners have again bypassed an obvious and available option for achieving their professed goal of obtaining a merits disposition of their appeal. These circumstances do not warrant an extraordinary writ of mandamus.

STATEMENT

1. Petitioners are Mississippi homeowners whose residences were allegedly damaged by Hurricane Katrina. They alleged that the Respondent oil, coal, utility, and chemical companies "unreasonably" engaged in worldwide energy exploration and production activities that "produce massive amounts of greenhouse gases," thereby contributing (together with all other sources of greenhouse gases) to "[i]ncreasing the concentration of greenhouse gases in the atmosphere." (Ct. of App. Record on Appeal (ROA) 753, 761.) This increase in the worldwide atmospheric concentration of such gases allegedly contributed to "a marked increase in global temperature which, in turn, produced the conditions whereby a storm of the strength and size of Hurricane Katrina would inevitably form and strike the Mississippi Gulf Coast resulting in extensive death, injury and destruction." (ROA 764-65.) Based on these allegations, Petitioners asserted putative class-action claims for nuisance, trespass, negligence, fraud, unjust enrichment, and civil conspiracy "under the laws of the State of Mississippi and appropriate legal regimes imported by the applicable choice of law rules." (ROA 756-57; *see also* ROA 767-68.)

2. After extensive briefing, the district court dismissed the action. The court concluded that Petitioners lacked Article III standing because their injuries were not "attributable or traceable to these individual defendants," but "to a larger group" that is "not before this Court, not only within this nation but outside of our jurisdictional boundaries as well." (Ct. of App. Record Excerpts (RE), Tab 5, at 36.) The district court also held that Petitioners' claims were

barred by the political question doctrine, because adjudication of those claims would require the court to do what *Baker v. Carr*, 369 U.S. 186 (1962), "told me not to do, and that is to balance economic, environmental, foreign policy, and national security interest[s] and make an initial policy determination of a kind which is clearly non-judicial." (RE, Tab 5, at 40.)

3. A three-judge panel of the Fifth Circuit issued an opinion reversing in part.[1] *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009). The panel held that Petitioners had satisfied Article III's requirement that their injuries be fairly traceable to Respondents' conduct by alleging that Respondents "*contribute* to, rather than solely or materially cause," global warming. *Id.* at 866. As to the political question doctrine, the panel acknowledged that *Baker v. Carr* articulated six alternative "formulations" for determining justiciability, but it dismissed these tests as "not necessary or properly useful in this case." *Id.* at 875. Instead, the panel held that the standard is "whether a question is entrusted by the Constitution or federal laws exclusively to a federal political branch for its decision." *Id.* at 872. The panel also briefly concluded that the *Baker* tests were not met. *Id.* at 875-76. Accordingly, the panel reversed the

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[1] The case was argued to two different panels in the court of appeals. The appeal was first assigned to a panel consisting of two active circuit judges and a district judge sitting by designation, but the district judge became unavailable shortly before the scheduled argument. After the case was argued and submitted to the remaining two judges, one of those judges recused himself, depriving the panel of a quorum. The case was then reargued to a new panel consisting of three active circuit judges.

dismissal of Petitioners' nuisance, negligence, and trespass claims. *Id.* at 879.[2]

Judge Davis "agree[d] with the panel opinion" on the standing issue, but agreed only "with the result" on the political question doctrine. *Id.* at 880. Judge Davis stated that, "[i]f it were up to me, I would affirm" on the ground that Petitioners had failed to allege proximate cause. *Id.*

4. Respondents petitioned for rehearing en banc, which was granted on February 26, 2010. Pet. App. 47. Seven of the court's 16 active judges were "recused and did not participate." *Id.*, n.1. Because the order did not retain the panel opinion pending rehearing, the effect of the order was to vacate that opinion and to stay the mandate. *See* Fifth Cir. R. 41.3. The en banc court ordered additional merits briefing, which was completed on April 30, 2010.

On the same date that briefing was completed, the clerk of the court notified the parties that an additional judge had recused herself and that the court believed it no longer had a quorum. Shortly thereafter, the court requested supplemental letter briefs addressing how it should proceed. Pet. App. 44-45.

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[2] The panel affirmed the dismissal of Petitioners' claims for unjust enrichment, fraud, and civil conspiracy. *Comer*, 585 F.3d at 867-69. The panel held that this subset of claims rested on an "alleged failure of the government to properly regulate and enforce environmental laws," and thereby ran afoul of prudential standing principles prohibiting reliance upon a "generalized grievance that is more properly dealt with by the representative branches." *Id.* at 868-69. Petitioners subsequently abandoned these claims by failing to defend them in their en banc merits brief.

Respondents argued that the court still had a quorum under the applicable statute, but that even if it did not, there were a number of available alternatives for curing the lack of a quorum. Defendants-Appellees' Supp. Letter Br. at 1-11 (5th Cir. May 12, 2010). Respondents explained, however, that if the court were to reject all of these alternatives, the only remaining option would be to dismiss the appeal, leaving the district court judgment intact. Petitioners, by contrast, argued for only one outcome—a return to the three-judge panel that had already ruled in their favor. Plaintiffs-Appellants' Supp. Reply Letter Brief at 1, 5-6 (5th Cir. May 17, 2010).

On May 28, 2010, the en banc court issued a per curiam order concluding that it had lost its quorum and therefore lacked authority to transact judicial business. Pet. App. 2-3. After briefly rejecting all other possibilities for disposing of the appeal, the court concluded that its only option was to dismiss the appeal. Pet. App. 3-5.

Judge Davis, joined by Judge Stewart, dissented, arguing that dismissal was not appropriate and that, alternatively, the appointment of a judge from another circuit to achieve a quorum was a preferable, and appropriate, remedy. Pet. App. 6-9.

Judge Dennis also dissented. Pet. App. 9-32. He argued that the court had a quorum and that even if it did not, the court could achieve a quorum by invoking the Rule of Necessity, requesting designation of a judge from another circuit, or holding the case over until the court regained a quorum. *Id.*

REASONS FOR DENYING THE PETITION

Mandamus is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Ex Parte Fahey*, 332 U.S. 258, 259-60 (1947); *see also Kerr v. U.S. District Court*, 426 U.S. 394, 402 (1976) (same). An original writ of mandamus issuing directly from this Court is an even more extraordinary remedy, and the discretion to issue such a writ is "sparingly exercised." Sup. Ct. R. 20.1.[3] Traditionally, the "'use of the writ in aid of appellate jurisdiction'" has been to confine a lower court "'to a lawful exercise of its prescribed jurisdiction.'" *Cheney v. U.S. District Court*, 542 U.S. 367, 380-81 (2004). Accordingly, "only exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion will justify the invocation of this extraordinary remedy." *Id.* at 380 (citations and internal quotation marks omitted).

Because the writ "is one of 'the most potent weapons in the judicial arsenal,' three conditions must be satisfied before it may issue." *Cheney*, 542 U.S. at 380-81. *First*, "'the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires'—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process." *Id.* at 380-81. *Second*, "the peti-

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[3] Respondents have not located any case in more than 30 years in which this Court has granted an original writ of mandamus. *Cf. Connor v. Coleman*, 440 U.S. 612, 614 (1978) (granting leave to file mandamus petition and ordering three-judge district court "forthwith" to adopt a reapportionment plan); *Connor v. Coleman*, 441 U.S. 792 (1979) (denying mandamus after district court complied with prior order).

tioner must satisfy the burden of showing that [his or her] right to issuance of the writ is clear and indisputable." *Id.* at 381 (internal quotation marks omitted). *Third*, "even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Id.*

Petitioners have failed to satisfy any of these requirements.[4]

I. Petitioners Have Failed to Pursue Available Alternatives

A. Mandamus Is Unavailable When a Petitioner Has Forfeited Available Alternatives

This Court has long held that a "petition for writ of mandamus will not be granted" when a petitioner had available alternative means of obtaining relief but failed to invoke those alternatives in a timely manner. *See Ex Parte Nat'l Park Bank*, 256 U.S. 131, 133 (1921) (failure to properly raise point on rehearing below, or in a petition for certiorari, barred mandamus); *Ex Parte Riddle*, 255 U.S. 450, 451 (1921) (failure to properly raise point below, or in a writ of

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[4] The petition would fare no better if it were converted into a certiorari petition addressed to the quorum issues, Pet. 25 n.49, because those issues are plainly unworthy of this Court's review. As set forth below, the Fifth Circuit's dismissal for lack of a quorum is consistent with this Court's precedent and does not conflict with any decision of any other circuit. Moreover, as Petitioners acknowledge (Pet. 26-27), the circumstances that produced dismissal here (a quorum at the time rehearing en banc was granted, followed by a later loss of a quorum) are unique and unlikely to recur.

error, barred mandamus). This rule follows from the settled principle that mandamus is a last-resort remedy. If the requirement that there be no adequate alternative to mandamus could be satisfied simply by *forfeiting* a means of obtaining relief through ordinary methods of review, then mandamus could readily be "used as a substitute for the regular appeals process." *Cheney*, 542 U.S. at 380-81.

Accordingly, to satisfy the threshold requirement that "the party seeking issuance of the writ ha[s] no other adequate means to attain the relief he desires," *Kerr*, 426 U.S. at 403, it is not enough to show that a petitioner *no longer* has an alternative remedy. If the petitioner had an adequate means of obtaining relief, but waived or forfeited that remedy, then mandamus relief is unavailable.

B. Petitioners Forfeited at Least Two Alternatives

In light of these principles, the Court should deny Petitioners' request for a writ of mandamus. Petitioners failed to avail themselves of at least two alternative avenues for obtaining a merits disposition of their appeal.

1. Petitioners Opposed Every Alternative Respondents Suggested for Hearing the Appeal En Banc

First, Petitioners affirmatively opposed below every suggested option for avoiding dismissal (other than reinstatement of the panel opinion), including one alternative that they now contend would have been viable and that they ask this Court to order the Fifth Circuit to revisit.

In their supplemental opening brief, Respondents presented a menu of options for the en banc court to consider in resolving the quorum issue, including the following:

> (1) finding that the en banc court did have a quorum under the proper construction of 28 U.S.C. § 46(d);
>
> (2) amending the Local Rules to invoke a statutory exception allowing smaller en banc panels, *see* 28 U.S.C. § 46(c), and deferring further consideration of the case under *North American Co. v. S.E.C.*, 320 U.S. 708 (1943), "until the amended rule took effect";
>
> (3) divesting disqualifying stock interests, as permitted under Advis. Opn. No. 69, Comm. on Codes of Conduct (June 2009 ed.)[5];
>
> (4) consulting with the Advisory Committee on Codes of Conduct to determine whether the existing recusals were warranted, as was done in *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 719 F.2d 733, 735 (5th Cir. 1983) (noting that four judges withdrew their disqualifications after such consultation);
>
> (5) requesting designation of an out-of-circuit active judge to serve on the en banc Fifth Circuit, pursuant to 28 U.S.C. § 291(a); and
>
> (6) invoking the Rule of Necessity.

Defendants-Appellees' Supp. Letter Brief at 1-11 (5th Cir. May 12, 2010). Respondents noted, however,

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[5] Available at <http://www.uscourts.gov/guide/Vol02B-Ch02-OGC-Post-PublAdvisoryOpps.pdf> at page 69-1.

that if all of these options were rejected, the only remaining alternative would be to dismiss the appeal for lack of a quorum, as this Court did when it lacked a quorum in *Chrysler Corp. v. United States*, 314 U.S. 583 (1941).

By contrast, Petitioners' supplemental opening brief proposed only one option—that the court "reinstate the panel's decision." Plaintiffs-Appellants' Supp. Letter Brief at 9 (5th Cir. May 12, 2010) ("Petrs.' Supp. Open. Br."). In their reply brief, Petitioners expressly opposed all of Respondents' suggestions for resolving the quorum issue, and they again insisted that the only option was to vacate the grant of rehearing en banc and restore the case to the panel. Plaintiffs-Appellants' Supp. Reply Letter Brief at 1, 6 (5th Cir. May 17, 2010) ("Petrs.' Supp. Reply Br."). Petitioners' all-or-nothing strategy backfired, however, when the en banc court concluded that it lacked statutory authority to "dis-en banc" the case and that the only available disposition was the same one suggested by *Chrysler*—dismissal. Pet. App. 4-6.

In their Petition in this Court, Petitioners reverse course. They contend that the "Fifth Circuit had several options for resolving its quorum issue" and that "*any* of the other options" besides dismissal would have been preferable. Pet. 27 (emphasis added). Although still questioning the propriety of several of these options, *see* Pet. 33-36, Petitioners now fault the en banc court for declining to invoke its discretion to defer further proceedings until such time as it might have a quorum. *See* Pet. 31-33.

Petitioners fail to note, however, that they affirmatively *opposed* a deferral of the case in the Fifth Circuit. Petrs.' Supp. Open. Br. at 10. The Fifth Circuit

did not deny that it *had* discretion to defer the case, Pet. App. 5, and if Petitioners had affirmatively requested a deferral, the court might have exercised its discretion differently. *Cf. North American Co. v. S.E.C.*, 327 U.S. 686 (1946) (when, two years after order deferring the case, Justice Burton replaced Justice Roberts, case was then decided by a quorum of 6 Justices).[6] By opposing an option whose viability they now urge, Petitioners demonstrably failed to pursue all available alternatives for obtaining relief.

Deferral was not the only discretionary option that Petitioners affirmatively opposed below. Petitioners likewise opposed as "inappropriate" Respondents' suggestion that judges could sell their disqualifying stock, *see* Petrs.' Supp. Reply Br. at 5, even though the practice is specifically endorsed by the Advisory Committee on Canons of Judicial Conduct, *see supra* at 10, is partly codified in 28 U.S.C. § 455(f), and is specifically accommodated by the Internal Revenue Code, *see* 26 U.S.C. § 1043(b). The court below may have been discouraged from considering this option by Petitioners' assertion that, by doing so, the court would "open itself to questions about the propriety" of its actions. Petrs.' Supp. Reply Br. at 5.

A petition for a writ of mandamus is reserved as a last-resort remedy when all other alternatives for obtaining relief have been tried and failed—not when, as here, such alternatives have been bypassed.

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[6] As *North American* shows, Petitioners are wrong in suggesting that deferral became an option only when a nominee was named. Pet. 32-33.

2. Petitioners Failed to File a Certiorari Petition Raising the Merits

Mandamus is unavailable for the further reason that Petitioners failed to pursue a certiorari petition directed to the *merits* of their appeal. In the absence of circumstances of "such public importance and exceptional character" as to warrant bypassing alternative means of relief, *Ex Parte Peru*, 318 U.S. 578, 586 (1943), a party's failure to seek available merits review "in this court by a petition for a writ of certiorari" bars issuance of a writ of mandamus. *Ex Parte Nat'l Park Bank*, 256 U.S. at 133.

Petitioners unquestionably had the option of filing such a petition. This Court has certiorari jurisdiction over any case that was "in the court of appeals," 28 U.S.C. § 1254(1), and this case was "in" the Fifth Circuit by virtue of Petitioners' timely notice of appeal and the jurisdiction conferred by 28 U.S.C. § 1291. *Nixon v. Fitzgerald*, 457 U.S. 731, 742-43 (1982). Indeed, Petitioners expressly acknowledged the availability of certiorari review on the merits when they successfully used that possibility as a sword against application of the Rule of Necessity in the Fifth Circuit. *See* Petrs.' Supp. Letter Br. at 4; Pet. App. 4.

Although Petitioners' mandamus petition contains a footnote observing that this Court "has the authority to convert a Petition for a Writ of Mandamus to a Petition for Certiorari," *see* Pet. 25 n.49, such a conversion—which Petitioners never actually request—would not obviate the problem here. Even if the current petition were recast as one seeking a writ of certiorari, the *merits* of the political question and Article

III standing issues at the heart of the appeal are not "fairly included therein." S. Ct. R. 14.1(a). Apart from three sentences observing that the district court dismissed the case on these grounds, *see* Pet. 6-7, 25-26, the Petition never mentions these issues, nor does it purport to discuss their proper resolution in light of the applicable case law. Indeed, the Petition fails even to include in the appendix either the district court's decision or the vacated panel opinion, thereby further confirming that the Petition does not fairly include those issues.[7]

Petitioners suggest that a merits certiorari petition would have been futile because this Court generally does not "sit as a first-instance court of appeals." Pet. 23. But the perceived futility of an alternative is *not* a basis for seeking mandamus instead. *In re Blodgett*, 502 U.S. 236, 240 (1992) (even though a further motion in the court of appeals "had little chance of success," such a motion was "a predicate for extraordinary relief" and should have been sought); *cf. Engle v. Isaac*, 456 U.S. 107, 130 (1982) (asserted futility does not excuse failure to seek state-court re-

[7] Moreover, the petition cannot now be amended to request that the Court grant certiorari on the merits, because the jurisdictional time limit to file such an entirely different petition has expired. 28 U.S.C. § 2101(c); *see* Eugene Gressman, et al., *Supreme Court Practice* § 6.27 at 471 (9th ed. 2007) ("it is not clear whether the Court has jurisdiction to permit" such an amendment); *cf. Costello v. United States*, 365 U.S. 265, 284 (1961) (granting leave where amended petition in civil case was submitted *within* the 90-day period); *Northeast Bancorp v. Board of Governors*, 472 U.S. 159, 176-78 (1985) (where petition already put constitutionality of statutes at issue, Court addressed related ground raised outside the 90-day window).

lief before seeking a writ of habeas corpus). Moreover, it is not clear that a merits certiorari petition would have been futile. *See, e.g., Connecticut v. American Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009), *petition for cert. filed*, No. 10-174. Petitioners' decision to forego filing such a petition further confirms their failure to pursue available alternatives to mandamus.[8]

II. Petitioners Have Failed to Show a Clear and Indisputable Right to a Writ of Mandamus

Petitioners' request for a writ of mandamus fails for the further reason that Petitioners have not shown a "clear and indisputable right" to the relief they seek. *Cheney*, 542 U.S. at 381. Here, the specific relief Petitioners request is a writ directing the Fifth Circuit to reinstate their appeal and "return it to the panel for final adjudication." Pet. 6. Petitioners have failed to show either a clear and indisputable error in the Fifth Circuit's dismissal of their appeal or a clear and indisputable entitlement to an order returning the case to the panel.

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[8] Petitioners argue that mandamus is the "only" proper remedy here because review of recusal issues is sometimes accomplished through mandamus petitions. Pet. 24-25 (citing cases). In contrast to the cited cases, however, Petitioners do not seek interlocutory review of the correctness of any particular judge's decision regarding recusal.

A. Petitioners Have Not Shown That the Fifth Circuit Made a Clear and Indisputable Error in Dismissing for Lack of a Quorum

1. The Fifth Circuit's Dismissal Was Proper Under This Court's Decision in *Chrysler v. United States*

The very disposition Petitioners contend was a clear and indisputable error—dismissal of the appeal for lack of a quorum—is the same one that this Court adopted when confronted with a lack of a quorum in *Chrysler Corp. v. United States*, 314 U.S. 583 (1941). In *Chrysler*, this Court had direct and exclusive appellate jurisdiction under a special statute governing antitrust cases, 15 U.S.C. § 29 (1940 ed.), but due to the recusal of four Justices, the Court lacked a quorum to decide Chrysler's appeal. 314 U.S. at 583. At that time, Congress had not yet enacted any statute specifying how the Court should dispose of a specific case in which it lacked a quorum.[9] This Court

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[9] In 1944, three years after *Chrysler*, Congress amended 15 U.S.C. § 29 to authorize this Court, in any direct appeal under that section in which it lacked a quorum, to order that the appeal instead be decided by a special three-judge panel of the relevant circuit court of appeals. Pub. L. No. 78-332, ch. 239, 58 Stat. 272 (1944). Thereafter, as part of its general revision and codification of the judicial code in 1948, Congress enacted a more general provision, 28 U.S.C. § 2109, which grants this Court similar authority with respect to all direct appeals in which it lacks a quorum. Pub. L. No. 80-773, ch. 646, 62 Stat. 869, 963, § 1 (1948). Section 2109 also specifies that, in any case not arising on direct appeal in which the Court lacks a quorum (*e.g.*, cases arising on certiorari), the Court must issue an order affirming the judgment below "with the same effect as upon affirmance by an equally divided court." 21 U.S.C. § 2109; *see*,

thus found itself in precisely the quandary that confronted the en banc Fifth Circuit here—it had direct appellate jurisdiction, but concluded that it lacked a quorum. And this Court did precisely what the Fifth Circuit did—it dismissed the appeal. 314 U.S. at 583. In light of *Chrysler*, it cannot be said that the Fifth Circuit's dismissal involves a "clear and indisputable" error.

2. Petitioners' Contrary Arguments Are Meritless

Although *Chrysler* is dispositive and figured prominently in the briefing below, the Petition does not even mention it. Petitioners instead advance an assortment of meritless arguments. Pet. 14-21, 26-31.

a. Petitioners' Argument That Only a Court With a Quorum Can Dismiss an Appeal Is Contrary to *Chrysler*

Petitioners contend that if a court lacks a quorum to *decide* an appeal, it necessarily lacks authority to *dismiss* the appeal. Pet. 17-19. This contention cannot be squared with *Chrysler*, in which this Court did precisely what Petitioners claim is forbidden. Under *Chrysler*, the one thing an appellate court incurably lacking a quorum *can* do—indeed, absent some other statutory authorization, the *only* thing it can do—is to dismiss the appeal.

Petitioners nevertheless contend that the en banc Fifth Circuit exceeded its authority in this case, be-

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e.g., *American Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008).

cause it issued an opinion *explaining* why it lacked a quorum. Pet. 18-19. But a court always has power to decide whether it has authority to adjudicate a particular case; only when the court concludes that it does have such authority may it proceed to render a decision on the merits. A court *always* has jurisdiction to decide its jurisdiction, *United States v. Shipp*, 203 U.S. 563, 573 (1906), and it likewise always has the power (indeed, the obligation) to determine whether it has a quorum, *Chrysler*, 314 U.S. at 583; *United States v. Desimone*, 140 F.3d 457, 458 (2d Cir. 1998).

b. Once Rehearing En Banc Is Granted, a Three-Judge Panel Lacks Statutory Authorization to Proceed

Petitioners contend that dismissal was improper because the en banc Fifth Circuit was not the exclusive forum for deciding the appeal. According to Petitioners, the en banc court had the option of returning the case to the panel. Pet. 21, 28-31. This argument contradicts the language of the controlling statute.

Under 28 U.S.C. § 46(c), "[c]ases and controversies shall be heard and determined by a court or panel of not more than three judges ... *unless* a hearing or rehearing before the court in banc is ordered" (emphasis added). Thus, by the plain terms of the statute, once a "rehearing before the court in banc is ordered," a three-judge panel is no longer authorized to "hear[]" and "determine[]" the appeal. At that point, exclusive authority rests in the en banc court. *See Cooey v. Bradshaw*, 338 F.3d 615, 616 (6th Cir. 2003) (en banc) (Clay, J., concurring) ("The granting of initial

en banc review eliminated the panel's jurisdiction over this matter.").

Petitioners nonetheless argue that the en banc court, even if it lacked a quorum, had authority to "vacate the order granting en banc rehearing" and to transfer the case back to a three-judge panel. Pet. 28-29. The Fifth Circuit correctly rejected this argument that a quorum-less court can "dis-enbanc" a case. Pet. App. 4. As Petitioners concede, the quorum requirement in § 46(d) applies, by its terms, to all actions of "a court or panel thereof." 28 U.S.C. § 46(d). Moreover, the vesting of authority in panels versus the full court is *not* a subject on which the statute is silent. Section 46(c) specifically describes both the composition of the en banc court that may vote to rehear a case and the composition of the en banc court that thereafter has control over the case. *Id.*, § 46(c). Under § 46(d), a quorum is clearly required for any such actions by the en banc court. No provision in the statute authorizes a quorum-less en banc court to take another vote on en banc rehearing and to send the case to a three-judge panel. On the contrary, the statute explicitly states—without exception—that once an en banc rehearing is "*ordered*" by an en banc court acting with a quorum, a three-judge panel may no longer proceed. *Id.*, § 46(c) (emphasis added).

Accordingly, the en banc Fifth Circuit found itself in the same situation this Court confronted in *Chrysler*: under the applicable statute, it was the only court authorized to hear the case, but it concluded that it lacked a quorum. Given Petitioners' opposition to all other alternatives for curing the lack of a

quorum, the proper disposition was the same one as in *Chrysler*—dismissal.

The correctness of the Fifth Circuit's dismissal is confirmed by the practice that is followed if, after granting rehearing, an en banc court is equally divided. In such a case, the en banc court does not reinstate the panel opinion or return the case to the panel; instead, it enters a summary order affirming the district court judgment. *See, e.g.*, *Thompson v. Connick*, 578 F.3d 293, 293 (5th Cir. 2009) (en banc); *Peoples v. CCA Detention Ctrs.*, 449 F.3d 1097, 1999 (10th Cir. 2006) (en banc). The net effect is exactly the same, whether it is called an "affirmance" or a "dismissal"—the district court judgment is left intact. *Cf.* 28 U.S.C. § 2109 (drawing a direct analogy between a summary affirmance for lack of a quorum and an affirmance by an equally divided court).

c. Petitioners' Complaints About the Fifth Circuit's Rules Are Wrong and Irrelevant

Because the applicable *statute* precluded returning the case to the panel, Petitioners' extended discussion of the Fifth Circuit's Rules and "Internal Operating Procedures" is beside the point. Pet. 20-21, 28-31. In any event, Petitioners misconstrue these materials.

Petitioners wrongly assert that, under the Fifth Circuit's Internal Operating Procedures, the panel retained authority over the appeal during the en banc proceedings. Such a retention of authority would directly contradict § 46(c), and it is therefore not surprising that the court's internal procedures say nothing of the sort. Rather, they state only that "*the filing* of a petition for rehearing en banc does not take

the case out of the control of the panel deciding the case," so that, for example, the panel itself "may grant rehearing without action by the full court." Rules and Internal Operating Procedures of the Fifth Circuit at 35-4 (2009) (emphasis added). Nothing in the procedures suggests that, in a case where the en banc court *has* acted by ordering rehearing en banc, the panel retains authority to act.

For similar reasons, Petitioners are wrong in suggesting that it was Fifth Circuit Rule 41.3 that led to the dismissal for lack of a quorum, and that the Rule should therefore be declared invalid. Pet. 29-31. The dismissal here did not arise from Rule 41.3, which merely states that, upon grant of rehearing, the panel opinion is vacated unless the en banc court orders otherwise. Rather, it arose from the quorum and en-banc provisions of a federal statute, *viz.*, 28 U.S.C. § 46.

Moreover, Petitioners misconstrue the limited significance that Rule 41.3 had here. As Petitioners implicitly concede, they would have no basis for objecting if the Fifth Circuit, at the time it granted rehearing en banc (with a quorum), had "*expressly* vacate[d] the panel decision in its Order." Pet. 30 (emphasis added). But Petitioners object that vacatur occurred here through the supposed "automatic[]" operation of Rule 41.3. But there was nothing "automatic" about that result. The local rule states that, unless the en banc court "otherwise expressly provide[s]" in its order, the panel's opinion and judgment are vacated upon the grant of rehearing. 5th Cir. R. 41.3. Thus, if the en banc court wants the panel opinion to remain in place, it can, and must, so specify. Here, the Fifth Circuit did not include any such

language in its order, opting not to retain the panel opinion. That decision, made when the court had a quorum, was unassailable.

d. Petitioners' Constitutional Claims Are Insubstantial

Petitioners assert that "[u]nder the U.S. Constitution, litigants have a right to an appeal," and that the Fifth Circuit therefore "had a constitutional duty to decide th[is] appeal." Pet. 15, 19. This argument fails, because there is no constitutional right to an appeal in a civil case. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996). Petitioners have only a statutory right to an appeal, one that is necessarily subject to all of the statutes and rules governing the disposition of appeals, including those (such as 28 U.S.C. § 46) that govern en banc proceedings. Consequently, the Fifth Circuit's invocation of that framework of statutes and rules cannot be said to have unconstitutionally deprived Petitioners of their statutory right to appeal.

Equally unavailing is Petitioners' reliance on inapposite cases holding that courts have only limited powers of abstention. *See, e.g., New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 358 (1989) (citing *Cohens v. Virginia*, 19 U.S. 264 (1821)). None of these cases supports the proposition that a court is barred from dismissing an appeal when it concludes that it lacks a quorum. On the contrary, a quorum has long been deemed essential to ensuring that a court is "legally able to transact business." *Nguyen v. United States*, 539 U.S. 69, 82 (2003).

Petitioners also contend that dismissal of their appeal deprived them of their constitutional right to equal protection. This contention is waived, because Petitioners never argued below that a dismissal would violate equal protection. It is also frivolous. Petitioners' appeal was not "arbitrarily" dismissed, Pet. 16-17; it was dismissed after the en banc court held that it had lost its quorum. *See supra* at 16-20.

Petitioners are also wrong in contending that they were denied equal protection because most circuits do not "automatically vacate the panel decision when rehearing is granted." Pet. 16.[10] All circuits are bound to follow § 46, which was the ultimate cause of the dismissal here. And to the extent that the circuits follow different conventions as to whether an en banc order that is otherwise silent operates to vacate the panel opinion, that is merely a convention about how to write such orders. *See supra* at 21-22.

B. Petitioners Have Failed to Make a "Clear and Indisputable" Showing That They Are Entitled to an Order Returning the Case to the Panel

Although Petitioners contend that any of the alternatives proposed by Respondents below would have been preferable to dismissal, Pet. 27, they persist in arguing, as they did below, that these various alter-

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[10] Petitioners' description of the circuits' practices with respect to vacating panel opinions, *see* Pet. 16 n.29, is inaccurate because Petitioners overlook the fact that many circuits address the subject only in their internal operating procedures. *See, e.g.*, D.C. Cir. Handbook of Practice & Internal Procs., XIII(B)(2); 1st Cir. Internal Operating Procs., X(D); 3d Cir. Internal Operating Procs., 9.5.9; 7th Cir. Internal Operating Procs., 5(e).

natives should be rejected. Pet. 33-36. Consequently, this Court can and should *deny* the Petition without further considering alternatives that Petitioners themselves have consistently opposed.[11]

The converse, however, is not true. If the Court were to conclude that the Fifth Circuit's dismissal constituted a clear and indisputable error, Petitioners still would not be entitled to an order returning the case to the panel. To establish an entitlement to that relief, Petitioners must also show that they are correct in contending that the various alternatives proposed by Respondents were unavailable. *See* Pet. 33-36. They have failed to do so. Because, as set forth

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[11] Petitioners now alternatively suggest that the Fifth Circuit could have exercised its discretion to defer proceedings, but Petitioners forfeited this argument by opposing such a deferral below. *See supra* at 11-12. And because any such decision was committed to the discretion of the court of appeals, it cannot be said that Petitioners had a "clear and indisputable" right to deferral. *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980). Moreover, as the Fifth Circuit noted, it is a matter of speculation whether or not a newly confirmed judge would also recuse or whether, during a deferral, other changes might occur in the composition of the court or the recusal status of its judges. Pet. App. 5. Subsequent events have confirmed the wisdom of that observation. Although Petitioners note that the Hon. James E. Graves, Jr. has been nominated to the court, *see* Pet. 32 n.61, Petitioners fail to note that the nominee's son is (and has been continuously since 2006 in both the district court and court of appeals) a counsel of record in this matter for one of the Respondents. And after the Petition was filed, one of the recused judges (Judge Wiener) assumed senior status, suggesting that the en banc court at this moment might conceivably have a quorum available even under Petitioners' view (8 of 15 active judges)—but only if no other recusals have occurred in the meantime and only until the court's status changes yet again.

below, there were at least three options for resolving the quorum issue—any one of which would preclude returning the case to the panel—Petitioners have failed to show a clear and indisputable right to the specific relief they request.

1. Petitioners Have Failed to Show That an Eight-Judge En Banc Court Would Be Improper

Petitioners contend, as they did below, that 28 U.S.C. § 46 requires a quorum of nine judges for the en banc Fifth Circuit to act. Pet. 34. Petitioners are incorrect.

Under § 46(d), a quorum is "[a] majority of the number of judges authorized to constitute a court or panel thereof, *as provided in paragraph (c).*" 28 U.S.C. § 46(d) (emphasis added). In defining both the set of judges who may vote to grant rehearing en banc and the set who may then decide the merits, paragraph (c) of § 46 uses the same key phrase: "circuit judges ... in regular active service." *Id.*[12] Prior to the 2005 amendments to Fed. R. App. P. 35(a), the circuits disagreed as to whether *recused* judges were included within that phrase for purposes of § 46(c)'s requirement that rehearing en banc be ordered by a "majority" of "circuit judges ... in regular active service." *See* Fed. R. App. P. 35(a) advisory committee's note (2005 amend.) ("2005 Advis. Comm. Note"). The 2005 amendment to Rule 35(a) resolved this dispute

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[12] Whereas § 46(c) states that only "circuit judges *of the circuit* who are in regular active service" may vote to rehear a case en banc, the separate clause of § 46(c) that defines the judges who may then decide the merits omits the italicized phrase and also provides for certain additional exceptions. *See infra* at 29.

by adopting *"a uniform national interpretation of § 46(c)"* under which the phrase "circuit judges ... in regular active service" would be construed to exclude recused judges. 2005 Advis. Comm. Note (emphasis added); *see also* Fed. R. App. P. 35(a) (explicitly providing that a "majority of the circuit judges *who are in regular active service and who are not disqualified* may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc") (emphasis added).

The Advisory Committee's reasoning for adopting this construction of § 46(c) is directly applicable here. The Committee agreed with the en banc Fourth Circuit's conclusion that the phrase "circuit judges in regular active service," as used in § 46(c) to describe the set of judges who may *decide* the merits of an en banc rehearing—which is the clause at issue here—"does not include disqualified judges, as disqualified judges clearly cannot participate in a case being heard or reheard en banc." 2005 Advis. Comm. Note; *Arnold v. Eastern Air Lines*, 712 F.2d 899 (4th Cir. 1983) (en banc). The Committee concluded that the identical language in the separate clause defining the judges who may vote to *grant* rehearing must be given the same reading, 2005 Advis. Comm. Note, and the Committee therefore proposed amending Rule 35(a) to reflect that construction of § 46(c). This Court approved the Committee's amendment to Rule 35 without recorded dissent. *Amendments to Fed. R. App. P.*, 544 U.S. 1151, 1160 (2005); *cf. also* 28 U.S.C. § 2072(b) (once promulgated by this Court, rules prevail over "[a]ll laws in conflict with such rules").

This construction of § 46(c) logically must carry over to the determination of a quorum under § 46(d)

(even though the Committee itself declined to resolve that issue expressly).[13] As noted above, § 46(d)'s definition of a quorum explicitly turns on § 46(c)'s definition of an en banc court. Because recused judges are not considered judges "in regular active service" in defining the court under § 46(c), they likewise cannot be counted in determining whether a quorum exists under § 46(d). *See Arnold*, 712 F.2d at 905 (§ 46 cannot be read to require that "a judge, though disqualified, should be treated as though he were part of the quorum"). Conversely, under the Fifth Circuit's (and Petitioners') view that the phrase "circuit judges in regular active service" must be read to *include* recused judges when calculating a quorum of the en banc court that may *decide* a case, *see* Pet. App. 3-4, that reading would have to carry over to the en banc *granting* context as well—meaning that, under Petitioners' view, the amendment to Rule 35 approved by this Court is necessarily invalid.

Petitioners assert that Respondent's reading of § 46 could allow for en banc courts that are too small. Pet. 34. That practical problem can readily be avoided by local rule, as in the First and Third Circuits. *See* note 13 *supra*. But more importantly, this argument misconceives the purpose of § 46(d)'s quorum requirement. Section 46(d) does not regulate the minimum number of judges who must *initially* be empanelled; it merely specifies how many judges must *remain* on the court that has been constituted (under § 46(c)) to decide a case. *Nguyen*, 539 U.S. at 82-83 (quorum re-

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[13] The sole import of the Committee's reservation of the quorum issue is that it allows a Circuit to set its own quorum requirement by local rule, as the First and Third Circuits have done. *See* 1st Cir. R. 35.0(a); 3d Cir. Internal Operating Procs., 9.5.3.

quirement does not set initial size of panels, which must always have three judges; it merely allows "'disposition by a panel of two judges in the event that one member of a three-judge panel to which the appeal is assigned becomes unable to participate'"). For example, the first panel assigned to hear this appeal lost its quorum in part because a district judge assigned to sit had a personal emergency arise shortly before argument. *See* note 1 *supra*. If half of the en banc Court empanelled to decide this case under § 46(c) likewise became absent, then a quorum would be lost under § 46(d).

In short, the eight active, nonrecused judges are all of the "circuit judges in regular active service" under § 46(c), and thus a majority of those judges—a quorum under § 46(d)—is five. Because a quorum remains available, Petitioners cannot be entitled to the specific relief they request, *viz.*, a return to the three-judge panel.

2. Petitioners Have Failed to Show That an Active Judge Could Not Be Designated From Another Circuit

Petitioners also argue that any lack of a quorum could not be cured by designating a judge to serve from another circuit. Pet. 33. This argument ignores the statutory text.

Federal law provides that the Chief Justice "may, in the public interest, designate and assign temporarily any circuit judge *to act as circuit judge in another circuit* upon request by the chief judge or circuit justice of such circuit." 28 U.S.C. § 291(a) (emphasis added). Except for certain administrative

tasks (such as hiring decisions or managing funds), a circuit judge so designated has "*all* the powers of a judge of the court, circuit or district to which he is designated and assigned." 28 U.S.C. § 296 (emphasis added). That language plainly includes the ability to decide the merits of an en banc rehearing.

This conclusion is confirmed by the language of 28 U.S.C. § 46(c). That section expressly limits eligibility to vote on *whether* to rehear a case en banc to the "circuit judges *of the circuit* who are in regular active service." *Id.* (emphasis added); *United States v. Nixon*, 827 F.2d 1019, 1022 (5th Cir. 1987) (judges of other circuits may not be designated to vote on whether to grant rehearing en banc). But in describing the judges who may *decide* the merits of an en banc case, § 46(c) omits the phrase "of the circuit" and instead provides that (except for senior judges authorized to serve in the limited circumstances set forth in § 46(c)), the en banc court that will decide a case "shall consist of all circuit judges in regular active service." 28 U.S.C. § 46(c). The omission of the phrase "of the circuit" means that an active circuit judge *of another circuit* who has been designated to act as a circuit judge of the Fifth Circuit may serve on an en banc court that will decide a case.[14]

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[14] The omission of the phrase "of the circuit" in the current statute is especially significant because it appeared in an earlier version of § 46(c), and this Court had specifically relied on that phrase to hold that only active judges of "the circuit involved" may decide a case en banc. *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 685, 688 (1960) (construing prior version of § 46(c), which stated that a "court in banc shall consist of all active circuit judges *of the circuit*") (emphasis added). Given the weight that the Court had placed on this phrase, its later omission invokes the settled canon that "a change in language

The distinction thus drawn by § 46(c) on this score makes perfect sense. The decision "*whether to rehear* a case in banc ... is essentially a policy decision of judicial administration," *Moody v. Albemarle Paper Co.*, 417 U.S. 622, 627 (1974), and it is therefore reasonable to confine that decision to the "circuit judges of the circuit who are in regular active service," 28 U.S.C. § 46(c). But "voting *on the merits* of an in banc case is quite different," *Moody*, 417 U.S. at 622; once rehearing has been granted, disposition of the case is no longer a matter of local circuit policy, but simply involves the correct determination of the law as applied to the pertinent facts. That same distinction is also reflected in the fact that, while § 46(c) reserves the decision to grant rehearing en banc to all active judges of the circuit, the statute allows large circuits (such as the Fifth and Ninth) to adopt local rules specifying that a much smaller panel of judges may render the actual merits decision. *See* 28 U.S.C. § 46(c); 9th Cir. R. 35-3 (allowing en banc rehearings to be decided by a panel of 11 judges rather than the full complement of 29).[15]

[must] be read, if possible, to have some effect." *American Nat'l Red Cross v. S.G.*, 505 U.S. 247, 263 (1992).

[15] Petitioners contend that designation of an out-of-circuit judge would constitute a "separation of powers" violation, because it would be tantamount to filling the existing vacancy on the Fifth Circuit in a manner that does not comply with the Appointments Clause of the Constitution. Pet. 33. This argument is patently meritless. Any active judge (or judges) of another circuit so designated would, of course, be a current Article III judge appointed in full conformity with the Constitution.

3. Petitioners Have Failed to Show That the Rule of Necessity Is Inapplicable

Finally, there is no merit to Petitioners' assertion that the Rule of Necessity was unavailable here. Pet. 35.

The Rule of Necessity provides that "a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but *must* do so if the case cannot be heard otherwise." *United States v. Will*, 449 U.S. 200, 213 (1980) (emphasis added) (internal quotation marks omitted). Assuming *arguendo* that the en banc Fifth Circuit had no quorum, Petitioners' appeal "cannot be heard otherwise" because under § 46, only the en banc court is authorized to proceed once rehearing is validly granted (as it indisputably was here). *See supra* at 18-20. Petitioners argue that the Rule does not apply because the "three-judge panel ... has jurisdiction and can render a decision," Pet. 35, but that is incorrect for the reasons explained above.

Petitioners also suggest (as they did below) that the Rule of Necessity applies only in "a court of last resort." Pet. 35. This contention is refuted by *United States v. Will*, which noted that the Rule has often been invoked in *lower courts* when a matter otherwise could not be heard. 449 U.S. at 213-24 (collecting cases).

For obvious reasons, Petitioners do not rely on the Fifth Circuit's primary rationale for rejecting application of the Rule of Necessity here, which was that Petitioners had the option of presenting the merits of their appeal to this Court. Pet. App. 4. In any event,

there does not appear to be any authority supporting the view that the Rule of Necessity is unavailable, despite the inability of the lower courts to act, merely because resort may be had to this Court. This novel and impractical view has thus far apparently been urged only in dicta in a dissenting opinion. *Evans v. Stephens*, 387 F.3d 1220, 1240 (11th Cir. 2004) (en banc) (Wilson, J., dissenting).[16]

III. Petitioners Are Not Entitled to a Favorable Exercise of this Court's Discretion

Lastly, to obtain a writ of mandamus, Petitioners must show that an exercise of this Court's discretion in granting mandamus relief is "appropriate under the circumstances." *Cheney*, 542 U.S. at 381. It plainly is not.

Petitioners' rhetoric that this case represents an "egregious breakdown" of "fundamental fairness" and a "travesty," Pet. 12, 14, rings hollow in light of Petitioners' vigorous opposition below to *every* option for allowing the case to proceed *except* for the one option that would give them a predetermined favorable outcome. *See supra* at 9-12. Petitioners' all-or-nothing approach in the court of appeals may have made tac-

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[16] The Fifth Circuit also expressed the concern that there is no "method to select one particular judge" whose recusal would be set aside by the Rule of Necessity. Pet. App. 4. This overlooks the long-established precedent of the Judicial Panel on Multidistrict Litigation, which in similar circumstances regularly invokes the Rule to permit *all* judges with the same ground of disqualification (typically, stock ownership) to participate, even if only one judge is needed to make a quorum. *In re Wireless Tel. Radio Frequency Emissions Prods. Liability Litig.*, 170 F. Supp. 2d 1356, 1358 n.4 (J.P.M.L. 2001).

tical sense to them at the time. But having taken that approach, Petitioners are in a poor position to complain about any resulting inability to obtain a merits disposition of their appeal.

Moreover, despite Petitioners' contention that the Fifth Circuit unfairly deprived them of their "statutory right to an appeal," Pet. 25, Petitioners failed to pursue the most evident option they had to obtain a merits disposition of their appeal—the filing of a certiorari petition that presented this Court with the merits. At the very least, Petitioners could have filed a petition that raised both the quorum issues and the merits issues. Petitioners' course of action cannot have been an oversight, because the Fifth Circuit reminded the parties of their ability to seek review in this Court, Pet. App. 6, and Petitioners themselves acknowledged that option below. *See supra* at 13.

In view of Petitioners' litigation choices, this case is plainly not among those exceptionally rare cases that warrant an exercise of this Court's discretion to grant mandamus relief.[17]

CONCLUSION

The petition for a writ of mandamus should be denied.

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[17] Moreover, even if the mandamus Petition could be construed, against its terms, as a request for a writ of certiorari on the quorum issues, certiorari review of those issues would be equally unwarranted for the reasons explained above.

Respectfully submitted,
November 2010

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